



FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

AUG 16 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Brenn Bybee

Orem, Utah 84057

RE. MUR 5333

Dear Brenn Bybee:

On June 30, 2004, the Federal Election Commission found that there is reason to believe you violated 2 U.S.C. § 441f, a provision of the Federal Election Campaign Act of 1971, as amended ("the Act"). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

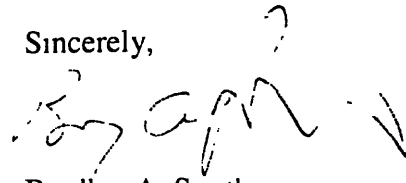
If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

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This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the investigation to be made public.

For your information, we have attached a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Mark Allen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Bradley A. Smith", with a stylized flourish at the end.

Bradley A. Smith
Chairman

Enclosures

Factual and Legal Analysis
Procedures
Designation of Counsel Form

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Brenn Bybee

MUR 5333

I. GENERATION OF MATTER

This matter was generated based on information ascertained by the Federal Election Commission ("the Commission") in the normal course of carrying out its supervisory responsibilities. *See* 2 U.S.C. § 437g(a)(2).

II. FACTUAL AND LEGAL ANALYSIS

A. Available factual information

Brenn Bybee contributed \$1,000 to John Swallow for Congress (“Committee”) on June 26, 2002. The available information indicates that Brenn Bybee’s contribution was made by a check drawn on the account of Winterfox, LLC (“Winterfox”) The Winterfox check was attributed to Brenn Bybee and several other persons, as set forth in the chart below Winterfox is a limited liability company (“LLC”) identified in public records as an active LLC organized in Utah

Check drawn on account	Check date	Amount	Attributed persons (\$1,000 each)
Winterfox, LLC	6/28/02	\$5,000	Brenn Bybee, Evan Bybee, Tamra Bybee, Targe Bybee, Nicail Bybee ¹

Winterfox wrote a \$5,000 check to the Committee dated June 28, 2002, that was signed by Evan Bybee and contained a memo line reading “1,000 ea Evan, Tamra Bybee, Targe Bybee, Nicaill Bybee, Brenn Bybee ”

1 The Committee disclosed the receipt of \$1,000 from each Bybee on June 26, 2002, designated for the primary election

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2 **B. Law on contributions by LLCs, corporations and partnerships**

3 The Commission's regulations establish two possible treatments for contributions by
4 business entities that are recognized as limited liability companies under the laws of the State in
5 which they are established. 11 C F R § 110 1(g)(1) The treatment depends on how the firm
6 elects to file with the Internal Revenue Service ("IRS") *Id* at 110 1(g)(2) If the contribution is
7 from an LLC filing with the IRS as a partnership pursuant to 26 C F R § 301 7701-3, or from
8 one that fails to make an election, it shall be treated as a contribution from a partnership pursuant
9 to 11 C.F.R. § 110.1(e). *Id* If the contribution is from an LLC electing to file with the IRS as a
10 corporation, the contribution is prohibited 2 U.S.C. § 441b(a) and 11 C F R § 110 1(g)(3) An
11 LLC that makes a contribution pursuant to this provision shall, at the time it makes the
12 contribution, provide information to the recipient committee as to how the contribution is to be
13 attributed, and affirm to the recipient committee that it is eligible to make the contribution
14 11 C.F.R. § 110.1(g)(5).

15 The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits
16 corporations from making contributions in connection with any election and prohibits any
17 candidate or political committee from knowingly accepting or receiving any such contributions.
18 2 U.S.C. § 441b(a). In addition, section 441b(a) prohibits any officer or director of any
19 corporation from consenting to any contribution by the corporation. The Commission has
20 recognized, however, limited circumstances in which a corporate employee may make a
21 contribution drawn on a corporate account, specifically, a nonrepayable corporate drawing
22 account established to permit an employee to draw against her salary, profits or other
23 compensation. *See Campaign Guide for Congressional Candidates and Committees* (2002),

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1 page 21; *FEC Record*, September 1978, page 1.² Contributions may not be made from the
2 general treasury fund of corporations. See 2 U.S.C. § 441b(a), cf. *FEC v. Massachusetts Citizens*
3 *for Life*, 479 U.S. 238, 241 (1986).

4 A contribution by a partnership shall be attributed to the partnership and to each partner
5 in one of two ways. 1) in proportion to his or her share of the profits, according to instructions
6 which shall be provided by the partnership to the political committee or candidate, or 2) by
7 agreement of the partners, as long as only the profits of the partners to whom the contribution is
8 attributed are reduced (or losses increased), and these partners' profits are reduced (or losses
9 increased) in proportion to the contribution attributed to each of them. 11 C.F.R. § 110.1(e). A
10 contribution by a partnership shall not exceed the Act's limitations on contributions, and no
11 portion of such contribution may be made from the profits of a corporation that is a partner. *Id.*

12 **C. Analysis of contributions**

13 Winterfox, an LLC, wrote a \$5,000 contribution check to the Committee. Winterfox
14 attributed this amount to Brenn Bybee and several other persons. No contribution was attributed
15 to the LLC itself. The threshold question regarding LLC contributions is whether the LLC is to
16 be treated as a corporation or as a partnership, which depends on whether the LLC elected
17 federal income tax treatment as a corporation. See 11 C.F.R. § 110.1(g). The available
18 information does not indicate whether Winterfox elected tax treatment as a corporation.

19 The Winterfox check on its face attributes the contributions among several individuals,

² The only place in the Act or the Commission's regulations that specifically addresses the making of contributions through nonrepayable corporate drawing accounts is in the context of contributions to separate segregated funds. See 11 C.F.R. § 102.6(c)(3). This regulation provides that a contributor may write a check that represents both a contribution and payment of dues or other fees that must be drawn on the contributor's personal checking account or on a "non-repayable corporate drawing account of the individual contributor." *Id.* See also Explanation and Justification, 48 Fed. Reg. 26,297 (June 7, 1983).

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1 but it does not appear that the LLC affirmed to the Committee that it is eligible as an entity to
2 make the contributions in the first place. *See* 11 C.F.R. § 110.1(g)(5).

3 There appear to be contributions made in the name of another whether Winterfox was
4 treated as a corporation or as a partnership. The Act prohibits contributions made in the name of
5 another person and prohibits a person from knowingly permitting her name to be used to effect
6 such a contribution. *See* 2 U.S.C. § 441f. If Winterfox was treated as a corporation, then it made
7 contributions in the names of the various individuals to whom the contribution was attributed. If
8 Winterfox was treated as a partnership, then the attributed partners made contributions in the
9 names of the other individuals who are not partners. In addition, the various attributed individual
10 contributors may have knowingly permitted their names to be used to effect
11 the Winterfox contribution on their behalf. *See* 2 U.S.C. § 441f. Therefore, there is reason to
12 believe that Brenn Bybee violated 2 U.S.C. § 441f.

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